



June 22, 2001

Ms. Michelle Simpkins
Winstead, Sechrest & Minick
100 Congress Avenue, Suite 800
Austin, Texas 78701

OR2000-2660

Dear Ms. Simpkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148663.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for all documents prepared by or received from attorneys for the district since February 27, 2001. You indicate that you will release some of the requested information. However, you claim that responsive information in two documents is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. The requestor has submitted a letter to our office arguing for the release of the information. *See* Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

We begin by noting that one of the documents you have submitted to this office, an attorney status report, is subject to section 552.022(a)(1) of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

Gov't Code § 552.022(a)(1). Thus, the status report, which you have marked as "Exhibit D" must be released unless it is confidential under other law or excepted under section 552.108 of the Government Code. You assert that a portion of the status report, which you have highlighted, is excepted under sections 552.107 and 552.111 of the Government Code. However, section 552.107 of the Government Code, which excepts information within the attorney-client privilege, and section 552.111 of the Government Code are discretionary exceptions and do not constitute "other law" for purposes of section 552.022. Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)); Open Records Decision No. 473 (1987) (governmental body may waive section 552.111).

Nonetheless, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ).

You indicate that the status report was prepared by the district's legal counsel and was distributed to the board of directors for the district. You further indicate that the report contains opinions regarding future action in litigation involving the district. Based on your representations and our review of the status report, we conclude that the report contains information that is protected by the attorney-client privilege. You indicate that the district seeks to withhold only the highlighted portion of the report. We note, however, that when a document contains confidential attorney-client communications, the privilege attaches to the entire document, not just to specific portions relating to legal advice, opinions, or mental analysis. *See Pittsburgh Corning*, 861 S.W.2d at 427. Thus, the entire status report, not just the highlighted portion, is protected under the attorney-client privilege. However, if the district chooses to waive the privilege, it need not withhold the entire status report. *See* Tex. R. Evid. 511(1).

Next, we address your argument that the second document, a letter between attorneys for the district, is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the district is currently involved in litigation with the Williamson County Water Company. In support of this contention, you have submitted pleadings from the case of *Brushy Creek Municipal Utility District v. Williamson County Water Company, Inc.*, No. 00-382-C368 (368th Judicial District Court, Williamson County, Texas). You further indicate that the letter, which you have marked as "Exhibit C," relates to an important order in the litigation. Based on your representations and our review of the information, we agree that Exhibit C relates to pending litigation and may be withheld under section 552.103.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district may withhold the highlighted information in Exhibit D as well as the rest of the document under Rule 503 of the Texas Rules of Evidence. Additionally, the district may withhold Exhibit C under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

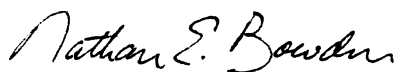
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 148663

Enc: Submitted documents

c: Mr. John C. McLemore
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Austin, Texas 78717
(w/o enclosures)